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IN THE

Supreme Court of the United States

October Term, 1976

Nos. 76-1718, 76-1737

ABRAHAM BEAME, MICHAEL J. CODD, ABRAHAM N. GOODMAN, MOSES L. KOVE, ELINOR GUGGENHEIMER, ROBERT A. LOW, ALEX MAUTNER, VICTOR MARRERO, MORRIS TARSHIS, PAUL O'DWYER, THEODORE KARAGHEUZOFF, P.E., and THE CITY OF NEW YORK,

Petitioners,

—against—

FRIENDS OF THE EARTH, FRIENDS OF THE EARTH NEW YORK BRANCH, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, CITIZENS FOR A BETTER NEW YORK, CITIZENS FOR CLEAN AIR, INC., COMMITTEE FOR BETTER TRANSIT, INC., ENVIRONMENTAL ACTION COALITION, INC., HARLEM VALLEY TRANSPORTATION ASSOCIATION, INSTITUTE FOR PUBLIC TRANSPORTATION, NYC CLEAN AIR CAMPAIGN, NEW YORK STATE TRANSPORTATION COUNCIL, NORTH EAST TRANSPORTATION COALITION, WEST VILLAGE COMMITTEE, DAVID SIVE and PAUL DUBRUL,

Respondents.

HUGH L. CAREY, JAMES MELTON, PETER A. A. BERLE and THE STATE OF NEW YORK,

Petitioners,

—against—

FRIENDS OF THE EARTH, et al.,

Respondents.

ANSWER TO PETITIONS OF ABRAHAM BEAME, et al., and HUGH L. CAREY, et al., FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(1) The State and City were not prevented from raising their constitutional claim by the statutory scheme;

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(2) The State and City, although they assert that they have a valid constitutional claim, do not make a constitutional argument under the relevant cases; and

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Statement of the Case

The petitioners seek to overturn a decision under the Clean Air Act that compels Hugh L. Carey, et al., (hereinafter the "State") and Abraham Beame, et al., (hereinafter the "City") to implement strategies contained in a Plan prepared by State and City agencies and submitted by the State's and City's highest officials to EPA with full knowledge that under the Clean Air Act EPA's approval would impose binding federal obligations. The thrust of the State's and City's claim is that the Clean Air Act prevented them from raising valid Constitutional arguments and that they are therefore deprived of sovereignty rights guaranteed by the Constitution. The record of the case is to the contrary. The petitioners ignore or mistake entire portions of the record and lower court decisions, including holdings that procedural requirements were fair as applied in this case, that they have had ample opportunity to present their case in a timely fashion, that they have taken inconsistent positions over a period of years, and that they have failed to seek available administrative remedies.

The instant case and its related cases have resulted in seven written opinions in the lower courts. The decisions in chronological order are as follows:

Friends of the Earth v. *EPA*, 499 F.2d 1118 (2d Cir. 1974) (Ratification of EPA approval of the New York State Transportation Control Plan (hereinafter "Plan") on petition for review pursuant to Section 307(b)(1), 42 U.S.C. § 1857h-5(b)(1)) (hereinafter *"Friends I"*). This petition for review was a separate proceeding and should not be confused with the instant case, which is a citizen suit enforcement action pursuant to Section 304, 42 U.S.C. § 1857h-2. *Friends I*, 499 F.2d at 1128.

Friends of the Earth v. *Wilson*, 389 F. Supp. 1394 (S.D.N.Y. 1974) (Citizen suit pursuant to Section 304,

42 U.S.C. § 1857h-2; first decision in this case—denial of preliminary injunction).

Friends of the Earth v. *Carey*, 401 F. Supp. 1386 (S.D.N.Y. 1975) (Second denial of preliminary injunction and denial of summary judgment).

Friends of the Earth v. *Carey*, 535 F.2d 165 (2d Cir. 1976) (Reversal of the two District Court decisions and direction that the City and State officials implement the Plan forthwith based upon construction of the Clean Air Act) (hereinafter *"Friends II"*).

Friends of the Earth v. *Carey*, 422 F. Supp. 638 (S.D.N.Y. 1976) (Limitation of enforcement of the Plan on remand from *Friends II* because of constitutional considerations).

Friends of the Earth v. *Carey*, 552 F.2d 25 (2d Cir. 1977) (Reversal of the District Court's constitutional decision and issuance of writ of mandamus directing prompt enforcement of the Plan) (hereinafter *"Friends III"*).

Friends of the Earth v. *Carey*, — F. Supp. — (S.D.N.Y. July 5, 1977) (Decision annexed hereto as Appendix I) (Denial of City's motion to suspend for six months or to eliminate the parking and bridge toll portions of the District Court's order of February 22, 1977 (City Pet.* App. IV) on the grounds that the City was in violation of procedural requirements of the order, had alleged nothing not known to it as early as 1973, had bypassed administrative remedies provided by the statute and had already litigated its legal claims).

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* References to "City Pet." and "State Pet." are to the respective City and State petitions for writs of certiorari.

These decisions have stated, restated and settled the relevant facts. The facts and holdings essential for this petition are as follows.

1. The substantive requirements of the Plan were without exception the State's and City's choices

The Clean Air Act compelled the states to attain air quality of specified standards and to do so within a specified period of time. *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 64-65 (1975). Each state was to prepare and adopt a plan of its own design meeting Clean Air Act criteria, § 110(a), 42 U.S.C. § 1857c-5(a), or, should it fail, or refuse to do so, the federal EPA was to promulgate its own Plan. § 110(c), 42 U.S.C. § 1857c-5(c). Here the State and City prepared and, after public hearings, adopted their own Plan with respect to transportation controls for the Metropolitan New York Region.

By drafting and adopting its own Plan, the State and City obtained substantial benefits under the Clean Air Act. EPA was required to accept the policy choices of the State and City and could not substitute its policy choices for those in the Plan. *Train* v. *Natural Resources Defense Council*, 421 U.S. at 79-80. Had the State and City not committed themselves to implement the strategies contained in the Plan, the Administrator would have had to disapprove the Plan as being only illusory. *Friends III*, 552 F.2d at 35. The State and City were able to make choices within the context of their own political, social and economic viewpoint. This latter benefit was particularly important and was emphasized by the New York Attorney General in defending the Plan and the Administrator's approval of it in *Friends I*. (Brief of the New York State Attorney General submitted in *Friends I* on behalf of the Governor of the State of New York, at p. 3).

Based upon this record the Court of Appeals found that "[t]he architects of the Plan were not Congress or the EPA but the State and the City of New York." *Friends III*, 552 F.2d at 34. The City did not and could not claim that it was unaware of the "scope, terms and reach of the Plan or of the scheme for its enforcement," such that it could not sooner question the Plan's constitutionality or interpretation. The Court ruled that the record established that the "City, having voluntarily cooperated with the State in the drafting and promulgation of the very strategies now attacked by it, seeks in effect to renege on its own creation and commitment." *Friends III*, 552 F.2d at 34.

2. The State consistently supported the enforceability of the Plan

The State did more than merely approve the Plan and submit it for approval to the Administrator. The State by the Attorney General defended the Plan in the Court of Appeals when the legality of the Administrator's approval was challenged. *Friends I*. Later, when plaintiffs first sought a preliminary injunction, the Assistant Attorney General informed the District Court Judge that the Plan "is a legally enforceable plan, is a legally adequate plan and that the state is committed . . . to fulfilling its responsibilities thereunder." Although he informed the Judge that the state would not implement certain strategies, he admitted that "If there is a valid legal ground for such a refusal, we have not been able to find it, your honor." *Friends of the Earth* v. *Wilson*, 389 F. Supp. at 1395, quoted in *Friends II*, 535 F.2d at 170. When the plaintiffs appealed the District Court's second refusal to require implementation of the Plan, the State declined to file a brief or participate in oral argument. *Friends II*, 535 F.2d at 168 n.1. After *Friends II* upheld

the enforceability of the Plan under the statute and was remanded for District Court enforecement, the State in May 1976 filed proposed orders and stated that the State would follow the Clean Air Act provisions by compliance with either the 1973 Plan or a revised Plan. (Aff. of Assistant Attorney General Paul S. Shemin, May 19, 1976 at ¶¶ 5, 7). In June 1976, the State did not join the City's motion challenging the constitutionality of enforcement. *Friends of the Earth* v. *Carey*, 422 F. Supp. 638 (S.D.N.Y. 1976). Finally, in January 1977, as the Second Circuit noted in the opinion rejecting the City's constitutional claim, the State again did not file a brief. *Friends III*, 552 F.2d at 33. In the four years since April 1973, the State has either supported the enforceability of the 1973 Plan or refused to participate in the City's challenges to the Plan. Only with the instant petition for certiorari has the State reversed its position and, for the first time, attacked its own approval and submission of the Plan. Thus over a four-year period, which saw seven court decisions and the administrations of three different Governors, the State has stood by its own Plan.

3. The City did not challenge the Plan until more than two years after the Plan's approval

The City was a full partner in the preparation of the Plan and allowed the State to submit the Plan to EPA on its behalf. *Friends III*, 552 F.2d at 30 n.3. The City had knowledge that the Plan was enforceable nine months before *Friends I* was decided. A memorandum to Administrator Low's immediate predecessor dated September 11, 1973 discussed precisely the legal enforceability of the Plan. (Plaintiffs' Ex. E41-45; cited in *Friends III*, 552 F.2d at 34-35). The City, however, did not participate in *Friends I*. Instead the City allowed the State to

argue in support of the legality of the Plan's approval. As a result, *Friends I* explicitly held that the Plan was enforceable. In particular, the panel specifically mentioned the potential of enforced reduction of parking on the City streets as available to citizens should the City or State fail to carry out its duties under the Plan. *Friends I*, 499 F.2d at 1124.

There was no petition for certiorari from *Friends I*, and the City did not seek to intervene or otherwise attack the holding of *Friends I*.

When plaintiffs first sought enforcement of the Plan in October 1974, the City requested only that the District Court Judge withhold enforcement pending completion of the State's and City's attempt to revise the Plan pursuant to the administrative procedures of the Clean Air Act. *Friends of the Earth* v. *Wilson*, 389 F. Supp. at 1395. Not until September 22, 1975, did the City first allege that enforcement of the Plan might violate the Constitution. Thus over a period of two and one half years, which saw three court decisions and the administrations of two mayors, the City sat on its rights which it now says it was prevented from asserting.

4. The State and City have not petitioned for administrative remedies provided by the Clean Air Act

The Clean Air Act expressly provided several avenues of administrative relief from Plan strategies. *Union Elec. Co.* v. *EPA*, 427 U.S. 246 (1976). The State and City have never sought an administrative remedy.

The State and City might have sought a postponement pursuant to Section 110(f), 42 U.S.C. §1857c-5(f). They did not.

The State and City might have revised the Plan pursuant to Section 110(a)(3)(A), 42 U.S.C. §1857c-5(a)(3)(A). EPA is "required" to approve a revision so long as the ultimate effects of the State's choice of emission limitations will produce compliance with the national standards. *Train* v. *Natural Resources Defense Council*, 421 U.S. at 79-80. The State and City have at every stage of the litigation announced their intent to revise the Plan, but have never formally proposed a revision. The District Court deferred enforcement pending revision in *Friends of the Earth* v. *Wilson*, *supra*, but that promised revision has not been submitted to EPA to this day.

The State and City might have obtained an acceptable administrative order by conference pursuant to Section 113, 42 U.S.C. §1857c-8. In July 1976, when plaintiffs made their second request for a preliminary injunction, the State and City responded that they had been meeting with EPA for eight months in a Section 113 conference in hopes that an agreement could be worked out. The District Court in part denied the preliminary injunction on that basis. *Friends of the Earth* v. *Carey*, 401 F. Supp. at 1390; *Friends II*, 535 F.2d at 173, 178-79. But these negotiations ended in failure because the State and City refused to consent to any orders related to the four main strategies of the Plan. In mid-September, 1976, EPA unilaterally issued administrative orders against the State and City. These administrative orders subsequently became the models for the District Court order. Although these orders substantially diluted and lengthened the deadlines of the Plan, the State and City made no attempt to comply.

5. The District Court order of February 22, 1977 is in conformity with the Plan and has not been challenged

The City has annexed to its petition the District Court order of February 22, 1977, which was signed *after* the

decision in *Friends III*. (City Pet. App. IV). The City then accuses the District Court in the context of this petition from *Friends III* of ordering harsh requirements which jeopardize the existence of the City of New York, (City Pet. 14-19). The order, however, conforms precisely with the State and City Plan and neither the State nor City have challenged the terms of the order as being inconsistent with the State and City Plan.

On remand from *Friends II* in April, 1976, the District Court sought proposed orders. EPA and plaintiffs jointly submitted orders which EPA certified as being in conformity with the 1973 Plan. The State did not argue to the contrary and the City made only a few technical comments. The City did not propose a counter order although a time period was provided to do so. The District Court, however, did not issue an order in 1976, but instead issued its decision questioning the constitutionality of enforcement. *Friends of the Earth* v. *Carey*, 422 F. Supp. 638 (S.D.N.Y. 1976). After that decision was reversed in *Friends III*, and, on remand, on January 28, 1977, the District Court again asked for comment on the form of the proposed order. On this occasion the City did not object to the form of the order and agreed that the order could be entered as previously submitted by plaintiffs and EPA. *Friends of the Earth* v. *Carey* (July 5, 1977) (Appendix I at 6a-7a). The State and City did not appeal from the order of February 22, 1977.

As a result, while the City now repeatedly characterizes the order as being excessive, harsh and unrealistic, it did not propose a counter order, or challenge the order as issued. Thus the City lacks legal or factual basis to initiate a challenge to the content or form of the order for the first time in this Court on an appeal from *Friends III*.

The record concerning these orders, which is not before this Court and not fully developed, undercuts the

City's allegations concerning the orders. First, while the City claims the order forces the 50% reduction in parking, and while the Plan does contain such a strategy, the District Court in its order allowed up to three years to complete the 50% goal on the understanding that the period was sufficiently long to allow time for a revision on the Plan.

With respect to the City claim that the order eliminates "all" on-street parking, the District Court ruled on July 5, 1977 during oral argument that the City's interpretation of the order contradicted the City's own prior interpretation as well as the Court's understanding based upon the 1973 Plan. Judge Duffy promptly amended the order to undo the confusion which he found was caused by the City's violation of the order's procedural requirements. *Friends of the Earth* v. *Carey*, Appendix I at 13a. (It should be noted that most on-street parking in the relevant areas has been illegal for years).

Finally, as to bridge tolls, the Court order requires that the net revenue (estimated at $140 million) be used for mass transit subsidies. (City Pet. App. IV at 106-07). Bridge tolls for such purposes are not without official support. *United States Trust Co.* v. *New Jersey*, 97 S. Ct. 1505 (1977). With respect to this Plan, however, both houses of Congress, with the support of plaintiffs, have passed bills amending the Clean Air Act which will permit the Governor to eliminate the bridge toll requirement from the Plan if coupled with a commitment to prepare within a year a plan for financing mass transit. The bills are likely to become law, holding the possibility that the bridge tolls strategy will soon be eliminated.

The economic allegations of the City are likewise presented for the first time in this Court. The City complains that the Court of Appeals in *Friends III* did not consider the economic impact of the decision. (City Pet.

15-16). But, as the Court of Appeals noted, the City did not claim that for financial reasons it could not comply. *Friends III*, 552 F.2d at 39 n.7. After filing its petition for certiorari in this Court, however, the City moved to suspend or eliminate the parking and bridge toll portions of the February 22, 1977 order based upon broad, nonspecific economic grounds pursuant to Rule 60(b)(6), Fed. R. Civ. P. That motion was denied because the economic claims of the City were alleged too late for a Rule 60(b)(6) motion and because the City had administrative remedies. *Friends of the Earth* v. *Carey*, Appendix I at 8a-10a. The District Court's denial of that motion has been appealed by notice of appeal filed on July 8, 1977. But the Court of Appeals did not before, and this Court does not now have, any record to support the economic harms alleged in the petition for certiorari.

Because there is no record on the City's economic claims, the Court is at sea with respect to the actual economic effects of the Plan. First, the City's extravagant allegations of economic harm are suspect because the City never balances economic benefits of the Plan against costs of implementation and because it never specifies which aspects of the Plan are the cause of excessive harm. This in part follows from the fact that the thrust of the City's allegations is against the ultimate goals and of the Plan strategies, not against the specifics of the Court order.

Secondly, air pollution inflicts enormous economic costs. The Council on Environmental Quality reported that New York City's carbon monoxide problem was uniquely severe. (Council on Environmental Quality, *Seventh Annual Report* 213 (1976).) The City's own monitoring stations show that the eight hour national health standard is violated in midtown Manhattan every day that it is tested. Businesses leaving Manhattan prominently mention air pollution, congestion and poor mass transit as a cause for their leaving, and tourists complain

of and stay away for the same reasons. Studies show that vehicles on New York City streets move more slowly than they do on the streets of any other major United States city, and that, as a result, the cost of moving goods is higher. The New York Regional Plan Association has supported the court order, declaring that the order's requirement to reduce illegal and legal on-street parking in Midtown Manhattan would improve business rather than hurt it. The Regional Plan Association pointed out that if there were a total ban on automobile parking on Midtown Streets during business hours, only 10,000 out of the 3,000,000 people coming into Midtown would be inconvenienced while the rest would benefit.

Had the State and City raised their economic claim below, these issues could have been sorted out. Instead, the Court is presented with unsupported assertions and generalizations which will have to be briefed for the first time in this Court.

6. The State and City arguments confuse issues settled in prior litigation with those issues now appealable

The State and City say that the Plan's adoption by the State and submission to EPA was defective. But the manner of adoption and legality of the Plan was settled in *Friends I*. In that case Friends of the Earth and other petitioners questioned the adequacy of legal authority underlying the strategies of the Plan. The State supported the adequacy of the Plan. The Court of Appeals rejected the petition, holding that EPA properly approved the State's Plan. As the later panel summarized the holding of *Friends I*,

> "with the acceptance by the EPA and judicial ratification by this court, the Plan became binding upon and enforceable against state and local officials, subject only to the narrow revision and postponement provisions allowed by the Act." *Friends II*, 535 F.2d at 170.

It is important to note that *Friends I* is not the same case as this case. It was a Section 307(a) petition and neither the State nor the City, nor anyone else, filed a petition of certiorari.

Now in this Court, in the context of a defense to an enforcement action pursuant to Section 304 of the Clean Air Act, the State and City attempt to base their constitutional claim on a conclusion contrary to that reached in *Friends I*. To reopen that conclusion, however, raises problems of res judicata, collateral estoppel and the jurisdiction of this Court. But instead of dealing with the fundamental problems of attacking the holding of *Friends I* at this late stage, the State and City attack Section 307, by pretending that Section 307 took away their substantive rights. But Section 307 is only a procedural statute setting forth when questions related to the adoption of the Plan can be raised. The essential fact for this petition is that when *Friends I* was briefed, argued and decided, the State and City supported the legality of the adoption and submission of the Plan. *Friends III*, 552 F.2d at 34-35. The State and City thus rewrite history when they make the major premise of their constitutional claim the assertion that the Plan was adopted in an ultra vires or unlawful manner by the Governor and Mayor. Any constitutional argument must begin with conclusions of law as settled by *Friends I;* not with major premises and assertions to the contrary.

ARGUMENT

POINT I

The Petition By The State Was Not Timely Filed.

The State's petition for certiorari was filed after the passage of 90 days. 28 U.S.C. §2101(c). Ninety days from March 4, 1977, the day the Court of Appeals denied the City's motion for rehearing en banc, expired on June 2. The State's petition was not filed until June 6. The State has therefore failed to properly invoke this Court's jurisdiction. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

POINT II

The State and City, in order to make their petitions appear significant and of Constitutional dimension, make three misstatements. The record, to the contrary of the State and City allegations, shows that:

(1) The State and City were not prevented from raising their constitutional claim by the statutory scheme;

(2) The State and City, although they assert that they have a valid constitutional claim, do not make a constitutional argument under the relevant cases; and

(3) The State and City assert that they have been harmed because they are locked in, but the record shows that they have failed to seek available administrative relief.

The heart of the City and State petition for certiorari are the assertions that they have been prevented by Section 307 of the Clean Air Act from raising a valid

constitutional defense to the enforcement of the Plan, with the result that they have become unconstitutionally locked into decisions made four years earlier. The assertions are factually and legally false.

The first misstatement is the State's and City's claim that they have been prevented from raising their claim by Section 307 of the Clean Air Act.* The Clean Air Act expressly provided a procedure to raise all claims against the legality of a Plan—a petition for review pursuant to Section 307(b)(1), 42 U.S.C. § 1857h-5(b)(1). There was such a petition over the New York Plan, and the State participated. The State took the position that the Plan, which it and the City developed, approved and submitted to EPA, had been lawfully approved by EPA. *Friends I.* The State and City therefore are off on the wrong foot when they commence their claim by charging

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* Additional matters are obliquely suggested by the City Petition, but not spelled out. The City implies that the Court of Appeals precluded them from making their constitutional claim in a more timely fashion. (City Pet. 11). That is false. No one prevented the City from appearing in *Friends I*, and the City, for reasons which it has never explained, elected not to argue the constitutional claim in *Friends II* although it had earlier in September 1975 submitted a full constitutional argument in the District Court as a motion to dismiss. Its co-appellee, the City Transit Authority, did make the constitutional argument in *Friends II* based upon the then current Court of Appeals' decisions in *EPA* v. *Brown*, 97 S. Ct. 1635 (1977) and its companion cases, and plaintiffs responded. It was perhaps because the City had elected not to make its constitutional argument that the Court of Appeals refused to rehear the completed appeal, but required that the City make its constitutional argument as a motion to vacate. *Friends III*, 552 F.2d at 28-29. The City also mentions the absence of oral argument in *Friends III* and the fact that *Friends II* and *III* were decided by the same panel. But *Friends III* decided plaintiffs' motions to recall the mandate of the *Friends II* panel and was not a direct appeal. Oral argument takes place on such motions only where requested and the City did not request to be heard orally.

that it was the statutory scheme of the Clean Air Act that prevented them from making their constitutional claim. It was because of that fact that the Court of Appeals in *Friends III* held that the City had both waived its right to assert contrary contentions and was precluded by Section 307(b)(2) of the Clean Air Act from raising them in an enforcement proceeding. *Friends III*, 552 F.2d at 35, citing *Vargas* v. *Trainor*, 508 F.2d 485 (7th Cir. 1974), *cert. denied*, 420 U.S. 1008 (1975).

In their second misstatement, the State and City assert that what they have been prevented from raising is a valid constitutional argument, i.e., that enforcement of the Plan violates the Tenth Amendment. To make such an argument, however, the City and State must attack the holding of *Friends III* rejecting the City's substantive constitutional argument under the test of *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). *Friends III*, 552 F.2d at 37-39. But neither the State nor the City suggests that the Court of Appeals erred in its analysis of the holding of *Usery*. This omission is fatal.

This startling omission reduces the petitions for certiorari to an absurdity. The State and City argue that theirs is a constitutional claim, but do not argue that the Court of Appeals erred in its substantive constitutional decision. *Usery* is virtually ignored, being cited only in passing. (City Pet. 22; State Pet. 8). It is not clear why this happened. In the City's brief to the Court of Appeals below, *Usery* was their primary reliance, being cited twenty times in their brief. (The State, of course, filed no brief.)

The constitutional argument which the City does make, is, in any event, patently incorrect. The City's argument proceeds upon the false assumption that the Clean Air Act does, in fact, regulate state processes. The City

then states a flat rule that no federal law can create a binding mechanism by which states become bound (City Pet. 24). Because the *Usery* opinion contains no support for this proposition, the City resorts to slavery-era cases, such as *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), and *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66 (1860), for the proposition that federal law may not force state officials to take any affirmative action. *Prigg*, which held, *inter alia*, that a state court has no duty to implement federal law was, in effect, overruled on this point by the Civil War, as the Supreme Court made clear in *Testa* v. *Katt*, 330 U.S. 386 (1947).

To the extent that *Kentucky* v. *Dennison*, *supra*, has any remaining vitality, it limits the ability to require discretionary action from a state official. *Baker* v. *Carr*, 369 U.S. 186, 245 (1962) (Douglas, *J.* concurring). Enforcement of state implementation plans under the Clean Air Act involves only mandatory duties which have been established under the Plan.

The City's reliance upon *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937) does not raise a constitutional issue either. *Steward Machine* involved a federal statute which expressly directed states to conform their internal procedures to the federal rules. The Clean Air Act, to the contrary, provides the states with broad freedom so long as the plan devised by the state will result in the meeting of federal ambient air quality state standards. *Train* v. *Natural Resources Defense Council*, *supra*. Furthermore, *Steward Machine* was not a commerce clause case, but a general welfare clause case. U.S. Const. art. I, § 8, cl. 1. The distinction is of primary importance because, while the federal government can spend money for the general welfare, it cannot directly legislate for the general welfare. If Congress were permitted to condition its appropriations in any way it desired, then it would be able to economically coerce from the states all the powers re-

served to them under the Tenth Amendment. Since the Clean Air Act is within the scope of Congress' enumerated powers, the analysis must be made upon the standard of *Usery*, not on the more restrictive standard of *Steward Machine*.

Thus, the City's attempt to paint this case as presenting in ripe fashion the issue not decided in *EPA* v. *Brown*, 97 S. Ct. 1635 (1977), is simply wrong. *EPA* v. *Brown* concerned EPA promulgation of strategies pursuant to remedial authority under Section 110(c). This case concerns a state adopted plan which EPA only approved pursuant to Section 110(a). *Friends III*, 552 F.2d at 36-37. The City's second attempt to relate this case to *EPA* v. *Brown* because of alleged court-ordered legislation is equally wanting. The Court of Appeals held that legislation that may be required is "neither substantial nor directed toward an integral governmental function," and that, in any event, the "essential policy choices involved in creating the program were entirely within the control of the State and the participating City agencies, and not imposed by the federal government." *Friends III*, 552 F.2d at 38. That holding was based upon the Court of Appeals' analysis of *Usery*. The State and City do not attack that analysis, and, hence, have failed to set forth any basis for granting review.

The District Court order, in any event, issued subsequently to *Friends III*, does not compel legislation, but only requires the State and City to certify to the District Court that adequate legal authority exists to perform necessary action under the order. (E.g., City Pet. App. IV 105-107). The only time that the State has had to make such a certification, it certified that existing State legislation was adequate. On March 14, 1977, the State certified that there was no additional need for State legislation to collect bridge tolls on the East and Harlem River bridges. Furthermore, although the City

broadly asserts that no legislative body has ever ratified or passed legislation authorizing State or City officials to take steps required under the Plan, the fact is to the contrary. The State Legislature, to implement the Plan, passed legislation necessary to require retrofit of heavy-duty vehicles (Strategy A-2) and to begin emission inspections for light-duty vehicles (Strategy A-5). 1975 N.Y. Laws, chs. 761 and 762. The purpose in passing these statutes was to comply with the Plan. 1975 N.Y. Laws 1696, 1771-72 (McKinney).

The remaining claims of the City and State are not of constitutional dimension, but are wholly statutory or state law questions. Section 307 has been upheld as an important and intentional procedural device to speed finality in the adoption of Plans. *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654 (D.C. Cir. 1975). The State and City do not attack those holdings. Nor do the State and City assert that the Congressional scheme is unconstitutional or violates the principles laid down in *Bowles* v. *Willingham*, 321 U.S. 503 (1944) and *Yakus* v. *United States*, 321 U.S. 414 (1944). This case is thus unlike *United States* v. *Adamo Wrecking Co.*, 545 F.2d 1 (6th Cir. 1976), *cert. granted*, 97 S. Ct. 1596 (1977), where the petitioner claims that the regulation is invalid on its face and where it had not participated in the adoption, submission and review of the regulation, all in the context of a criminal case.

The State and City do make a vague claim that they are entitled to an exception to procedural requirements whose constitutionality and literal meaning they do not challenge. But their plea for an exception is undercut in this case by the absence of a strong substantive argument, by res judicata and related doctrines, and by consideration of fairness. First, they simply do not assert that the Court of Appeals erred in its application

of *Usery*. Second, the issues they do raise were all decided in *Friends I*, where the Court of Appeals upheld the legality and enforceability of the 1973 Plan in a Section 307(b)(1) proceeding in which the State participated and argued that the Plan was lawfully approved by EPA. No party sought certiorari from that decision. Both *Friends II* and *Friends III* relied upon the prior holding and conclusion that the Plan, submitted by the State and City, was controlling and must be carried out, and that it was binding upon and enforceable against state and local officials. *Friends II*, 535 F.2d at 169, 170; *Friends III*, 552 F.2d at 31, 32, 34-35.

Yet in their petitions for certiorari the State and City nevertheless assert that the Plan was void ab initio because of flaws in the state procedures used to adopt and submit the Plan to EPA. But these state law claims go to whether the Plan is binding and enforceable against State and City officials—the precise issue settled in *Friends I*. The State and City offer no explanation as to how this court can now review that decision's unappealed and settled holding.

The issues of collateral estoppel and res judicata are substantial. The City and State prepared the Plan together in extremely close cooperation. *Friends III*, 552 F.2d at 30 n.3, 34, 35; *see also prepared statement of Robert A. Low*, Implementation of Transportation Controls: Hearings Before the Subcom. on Environmental Pollution of the Senate Comm. on Public Works, 93d Cong., 2d Sess. 397 (1974). The State submitted the Plan on behalf of itself and the City, and then defended it in the Court of Appeals. *Friends III*, 552 F.2d at 30 n.3,

31. There is direct evidence of petitioners' knowledge that the Plan would be enforceable in the form of written legal advice dated September 11, 1973. *Friends III*, 552 F.2d at 34-35. That written advice preceded the oral argument in *Friends I* by seven months and the decision by nine months. (Oral argument on April 24, 1974 and decision on July 1, 1974).

The argument for an exception would appear hopeless in any event. EPA and the Court of Appeals in *Friends I* relied upon the Mayor, the Governor and the State Attorney General as to the legality of the Plan. As this Court has held with respect to a State's Eleventh Amendment rights:

> "the immunity of sovereignty from suit without [the State's] consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step." *Porto Rico* v. *Ramos*, 232 U.S. 627, 632 (1914).

The third major misstatement made by the State and City is that they are locked into their prior decisions. But here again, the facts are to the contrary. The Clean Air Act provides administrative routes to amend or change earlier choices of policy by the State and City; postponement, revision and variance, and administrative compliance orders. *Train* v. *Natural Resources Defense Council, supra; Union Elec. Co.* v. *EPA, supra.* The State and City never sought either a postponement, variance or revision, and failed to come to agreement with EPA on compliance orders. Thus, the failure to alter the 1973 Plan lies not with the statute, but with the conduct of the defendants.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX I

Opinion and Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 4500

FRIENDS OF THE EARTH, etc.,

Plaintiffs,

vs.

HUGH CAREY, et al.,

Defendants.

July 5, 1977
2 P.M.

Before: KEVIN THOMAS DUFFY,
District Judge.

APPEARANCES:

Ross Sandler, Esq.,
David Schoenbrod, Esq.,
Eric Goldstein, Esq.,
Attorneys for Plaintiffs.

W. Bernard Richland, Esq.,
Attorney for City Defendants,

By: Joseph Bruno, Stephen Kramer and Jack Brennan,
Assistant Corporation Counsel.

Louis J. Lefkowitz, Esq.,
Attorney for State Defendants,

By: Paul Shemin, Esq., of Counsel.

Robert B. Fiske, Esq., U.S. Attorney,
Attorney for Federal EPA,

By: Anne Eristoff, Esq., Assistant U.S. Attorney.

(DUFFY, J.)

Plaintiffs have moved this Court for an order compelling the city defendants to comply with Strategy B-3 of the Transportation Control Plan, the parking reduction strategy as it is incorporated into the February 22, 1977 order of this Court.

The defendant United States Environmental Protection Agency (the EPA) has joined in the plaintiffs' application. The city defendants have cross-moved to modify or to stay the February 22, 1977 order. The State apparently has joined in the city's motion.

Prior to discussing the arguments advanced by the parties, it would be useful to briefly outline the history of the Transportation Control Plan and of this case.

In 1970 Congress amended the Clean Air Act to require the Administrator of the EPA to establish two types of air quality standards: The "primary ambient", which was intended to protect the public health, and the "Secondary ambient", designed to protect the public welfare.

The primary standards governing pollution levels were promulgated on April 30, 1971. Section 110(a) of the Clean Air Act required each State to submit a plan providing for implementation, maintenance and enforcement of the primary standards. Each State plan was to be filed by April 1973, and the primary air quality standards actually met by May 31, 1975.

The State of New York did in fact submit a plan to the EPA on April 17, 1973, entitled "The Transportation Control Plan for the Metropolitan New York City Area," which contained 32 so-called strategies for reducing air pollution. Among them were the four strategies contained in my February 22, 1977 order: a selective ban on taxi

cruising, a limitation on after-hour deliveries, a reduction of parking and the imposition of tolls on the East and Harlem River crossings.

On June 22, 1973, the EPA approved the plan submitted by the State of New York with a few modifications including the grant, at the State's request, of a 19-month extension to comply with the photo-chemical oxidant and carbon monoxide standards.

Following the EPA approval, a group known as Friends of the Earth petitioned the Court of Appeals pursuant to Section 307(b)(1) of the Clean Air Act for review of the approved New York plan, alleging that it was inadequate to meet the air quality standards of the Act. The Court of Appeals substantially upheld the plan and remanded to the EPA for review of several aspects of the plan. In the same opinion the Court of Appeals, by Judge Lumbard, declined to order compliance with the plan on the ground that the jurisdiction to enforce did not lie with the Court of Appeals, but rather with the District Court through an enforcement action brought by the EPA under Section 113 of the Clean Air Act, or by a private citizen under Section 304.

On August 5, 1974, the plaintiffs served notice under Section 304(b)(1)(a) of their intention to commence a citizens' suit. On October 11, 1974, at the expiration of the required sixty-day waiting period the plaintiffs commenced this action. Thereafter, the plaintiffs moved for a preliminary injunction enforcing the plan. In oral argument the Assistant Attorney General representing the State of New York acknowledged that, and I quote: "This plan is a legally enforceable plan, is a legally adequate plan and that the State is committed to fulfilling its responsibilities thereunder."

At that time the Assistant Attorney General also advised this Court that the Governor Elect supported fully the implementation of the plan as it existed. The attorney for the city defendants argued that I should deny the injunction, in light of the pendency of negotiations with the EPA aimed at a revision of the plan.

On December 16, 1974, I ruled that "The policy favoring judicial restraint in cases such as this coupled with the probability of enforcement action by the USEPA dictate the application for preliminary injunction at this time be denied."

389 F. Supp. 1394, 1396.

Seven months later plaintiffs moved for an injunction against the planned increase in the New York City subway fare and again moved for injunction enforcing the Transportation Control Plan. Once again I denied the injunction against the fare increase, since the Transportation Control Plan contained no provision addressing the subway fare. And I denied the renewed request for enforcement of the plan and denied summary judgment to the plaintiffs.

There is an opinion on that in 401 F. Supp. 1386.

On August 29, the day after my filing that opinion, the plaintiffs filed a notice of appeal from my order.

On September 23, 1975, the city moved to dismiss the complaint on the constitutional grounds. The motion was held in abeyance pending the appeal to the Second Circuit.

On April 26, 1976, a panel of the Court of Appeals affirmed my decision not to enjoin the fare increase, but

reversed my denial of summary judgment to the plaintiffs. In so doing the Court of Appeals stated as follows:

"In denying relief under the citizen suit provision the Court referred to the existence of ongoing negotiations between the EPA and the State and City authorities designed to reach consent decrees in carrying out the Plan's mandated strategies. We join the District Court in recognizing the utility of such deliberations and the desirability of obtaining compliance through consentual means. But it is equally clear that the statute empowers neither the EPA nor the State to delay the approved Plan's strategies through negotiations, be they formal or otherwise. Negotiations are no substitute for enforcement and for timely compliance with the Plan's mandated strategies. Consequently, the District Court erred in permitting the continuation of the EPA-State discussions to bar suit by citizens groups seeking judicial enforcement of the Plan's expressed provisions. The Act authorizes only two procedural routes for modifying the Plan: a Section 110(a)(3) revision or a Section 110(f) postponement. In all other instances the State is relegated to a lone option: compliance." That can be found at 535 F.2d 165 at 178.

Partial summary judgment for the plaintiffs was then entered. The city petitioned the Court of Appeals for a rehearing. And although rehearing was denied, the Court of Appeals modified its mandate to permit me to consider the city's motion to dismiss as previously mentioned, which was filed on September 23, 1975.

In an opinion on July 13, 1976, reported at 422 F. Supp. 638, I ruled, and I am quoting only in part, "that the proper construction of Section 304 is that

citizen suits are authorized against the states and their subdivisions only to the extent that they are actual polluters or violators of the plan's requirements."

The parties appealed from my order and the plaintiff filed a petition for a writ of mandamus against me in the Court of Appeals.

In January 18, 1977 the Court of Appeals reversed my determination and granted the petition for mandamus, directing me to reinstate partial summary judgment as to the four strategies.

In the course of its opinion on the Court stated as follows:

"At this date, almost four years after the Administrator's approval of the Plan, to permit the City to renege upon its commitments would defeat the purpose of the Act, which is to protect the public health.

"Since the City could have advanced its present contentions by way of a petition for review of the Administrator's approval of the Plan in 1973 and chose instead voluntarily to commit itself to enforcement of the plan, we hold that the City has waived its right to assert these contentions."

That is found at 552 F.2d 25 at 35.

On the very same date that the mandate from the Court of Appeals was filed, I ordered all counsel in this case to appear before me. Counsel for the City was asked if there was any reason why I should not enter partial summary judgment for the plaintiff in light of the Court of Appeals mandate. Counsel for the City voiced no objection and in fact indicated that the form of the order

submitted by counsel for the plaintiff and for the EPA was agreeable to the City with the sole exception of the dates for compliance with various stages of the plan.

* * * * *

On February 22, 1977, I filed an order which incorporated the four strategies contained in the plan. The order established a series of compliance deadlines aimed at the ultimate implementation of those strategies. Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure the city defendants now seek to stay two of the four strategies, the parking reduction strategy, B-3, and the bridge tolls strategy, which is B-7.

In support of its application the city has filed a 300-page submission which includes affidavits from the Corporation Counsel, the Mayor, the Deputy Mayor for Economic Development, Chairman of the New York City Chamber of Commerce, the Administrators of the New York City Environmental Protection and Transportation Agencies, and the Police Commissioner.

Included as exhibits to the affidavits are a study entitled "Evaluation of the Economic Impact of the Court-ordered Transportation Control Plan Strategies," dated June 21, 1977, a June 1977 study of the Transportation Control Plan prepared by the Department of Air Resources, and an April 1977 study by the New York City Transportation Administrator, entitled "Traffic impact of tolls on the East and Harlem River Bridges."

The plaintiffs herein have produced a number of documents which if this were a trial could be considered affecting the viability of such studies. This is not a trial, howerer, and I see no need to get into the matter.

In seeking a stay or modification, the City relies upon the principle of equity, succinctly stated in Justice Car-

dozo's opinion in *United States* v. *Swift & Company*, 286 U.S. 106; page 114, 1932, "A continuing decree of injunction directed to events to come is subject always to adaptation as events shape the need."

This approach can also be found in other cases but not as well put. Thus it is for me now to determine whether any events have occurred since the entry of the February 22, 1977 order which would suggest the need for adaptation or stay of the order.

The arguments advanced by the city fall into four broad categories.

First, that the plan will be economically destructive to the city.

Second, that the plan will be ineffective in reducing air pollution.

Third, that the plan removes discretion from city officials to cope with police and traffic problems.

And fourth, that the likelihood of the Supreme Court granting the city's petition for certiorari warrants a stay.

The economic consequences of the plan and its effectiveness in improving air quality are issues which were assessable by the city officials long before the entry of the February 22nd order. Although the city has conducted surveys and studies, apparently since February 22, there is no indication that these studies were based upon newly developed facts. Rather, they appear to be based on data which has always been obtainable.

The effectiveness of the plan and its economic consequences are indeed the legitimate concerns of the municipal officials. But the time to begin evaluation is not after the submission of the plan, approval by the EPA, three appeals to the Second Circuit and the entry of a final order enforcing the four strategies. To permit a stay of the plan at this stage would be to place a premium upon inaction.

The claim of unwarranted interference with the discretion of the city officials was raised in the city's motion to dismiss on Tenth Amendment grounds, and as previously noted, I ruled substantially in the city's favor. But that determination has since been reversed on appeal. Having raised the claim and lost, the city defendants may not attempt to relitigate in this forum.

Nor does the pending of a petition for writ of certiorari provide an adequate basis for a stay. No factual or legal basis has been offered for the Corporation Counsel's belief that the city's certiorari petition will be acted upon favorably. Before a stay will be granted, more must be shown than a party's belief that his side will ultimately prevail. See *O'Brien* v. *Brown*, 409 U.S. 1 (1972).

In the light of the lengthy history of this case and the express direction of the Court of Appeals that I implement the plan expeditiously, the application for a stay is denied.

The city officials are not, however, without recourse to present new insights into the efficacy of the plan. Congress has provided that revisions of an approved plan may be sought through application to the EPA pursuant to Section 110(a)(3) of the Clean Air Act. A postponement may also be sought under Section 110(f). The

EPA, the agency responsible for enforcing the Clean Air Act, is best able to determine whether aspects of the plan require revamping.

I now turn to the joint application by the plaintiffs and the EPA to compel compliance with my order as it related to strategy B-3, the parking reduction strategy. The order requires the City defendants to submit to the EPA by May 14, 1977 a detailed work program to reduce and manage parking throughout the borough of Manhattan.

In regard to the Midtown Core—that area of Manhattan from 59th Street to 34th Street and 8th Avenue to 3rd Avenue—the submission was to contain a plan to eliminate all legal on-street parking spaces by June 14, 1977 as well as a plan to eliminate illegal on-street parking by January 14, 1978 through increased towing capabilities at a minimum level of removal of 500 automobiles per day. The City was to have submitted legally enforceable limitations upon the construction of new commercially available and non-commercially available parking spaces within the Midtown Core.

As to the Downtown Core—that area extending from Canal Street to the extreme southern tip of Manhattan between the East and Hudson Rivers—the City was required to submit a work plan—also by May 14, 1977—to provide for a ban on general on-street automobile parking between the hours of 8:00 A.M. and 6:00 P.M. with the exception of existing metered spaces which could be used legally at times other than rush hours. That is, from 7:00 A.M. to 10:00 A.M. and from 4:00 P.M. to 7:00 P.M. on week days. The ban was to take effect on June 14, 1977.

The downtown core work plan was also to have contained provisions for eliminating illegal on-street parking by January 14, 1978, through increased towing capabilities. Legally enforceable limitations on construction of new commercially-available and non-commercially available parking also were to have been submitted.

For the peripheral area, that is, the remainder of Manhattan south of 59th Street from the East River to the Hudson River, those areas between Canal Street and 59th outside of the midtown core, the city was to have submitted a work plan by May 14 to provide for a ban on general on-street parking from 8:00 A.M. to 6:00 P.M. on week days with the exception of existing metered spaces which could be used legally at times other than rush hours. The peripheral area ban is to become effective in August, on August 31, 1977. The peripheral area work plan could at the city's option provide for parking on specified streets which are primarily residential and are zoned as such. Also by May 14, the city was to have submitted work plans for parking surcharges, late openings, car pool rate reductions, space capacity limitations by time of day and zoning bonuses for closings. In addition, a parking space inventory was to have been submitted.

The attorney for the Environmental Protection Agency has filed an affidavit with this Court, dated June 27, 1977, in which she submits that "The city defendants failed to submit any program of any kind to EPA by May 14, 1977, and none has yet been submitted."

Actually, on May 14, 1977, this Court did receive a submission from an Assistant Corporation Counsel which stated in part as follows:

"Pursuant to Paragraph E"—and I am quoting again—"of the order implementing Strategy B-3, I wish to advise the Court that it is impossible for the city to make a submission required by Paragraph A," which concerns the midtown core, the downtown core and the peripheral area, insofar as these paragraphs relate to illegal on-street parking. "Enclosed herewith are copies of documents relating to the police department's towing program. It is the City's belief that the number of tows required by the paragraphs of the order was erroneously computed.

"We will shortly seek modification of the order so as to correct this error. In addition, it is impossible to comply with the provisions of paragraph A(a)(II)(aa)" —that is the downtown core—"insofar as the paragraph relates to legal on-street parking because of the time required to manufacture and install necessary parking signs. Moreover, the submissions required by Paragraph A(2)(IV)" which deal with parking surcharges, late openings and car pools and all the rest of that, "will be included in the Parking Management Study." A copy of a proposed contract for this study was submitted to this Court on April 1, 1977.

Accompanying the letter were a number of submissions which purported to comply with the February 22 order: For example, the city submitted the following work plan for the midtown core, and I quote: "There are 206 meters with a revenue of $200,607. The meters can be made inoperative within 30 days by the Department of Traffic."

It is apparent from the city's own admissions contained in its May 14 letter to the Court that it has not fully complied with my order. My order required a work plan. Nothing even approaching that was submitted.

One of the immediate consequences of the failure to submit a proper work plan in advance of implementation is the present dispute among the parties as to the scope of the parking ban for the midtown core.

On June 14, 1977, the city imposed a 24-hour ban on all on-street parking in the midtown core. Plaintiff argued that the city's action was over-inclusive and a ban during business hours is all that is required. Had the city properly submitted its work plan to the EPA prior to the implementation, the ambiguity of which we heard so much today could have been eliminated prior to today.

In light of the city's admitted failure to comply with the order, the following is hereby ordered:

"1. Counsel for the EPA is directed to forthwith submit a proposed order incorporating the one amendment to the February 22 order which I have approved already; that is, modification of the effective hours of midtown core parking ban;

"2. The city is directed to submit to the EPA within ten days the work plans required by Paragraphs 2(a)(i)(aa) and 2(a)(ii)(aa) of the February 22 order;

"3. The city is directed to submit to the EPA within thirty days all other materials which were originally due on May 14;

"4. Should any of the defendants fail to comply with any of the above directons, counsel for the plaintiff or for the Environmental Protection Agency may commence contempt proceedings by submitting a proposed order to show cause."

So ordered.